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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1942

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**No. 1072** 85

MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.,
*Petitioners,*

*against*

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.

**No. 1073** 86

PROTECTIVE COMMITTEE FOR HOLDERS OF COMMON STOCK OF MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR,
*Petitioner,*

*against*

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.

**No. 1074** 87

ALLEGHANY CORPORATION,
*Petitioner,*

*against*

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.

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# PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1942

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# No.1072

MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR; PROTECTIVE COMMITTEE FOR HOLDERS OF FIRST MORTGAGE BONDS OF INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY; GERALD AXELROD, ET AL., OWNERS AND HOLDERS OF TWENTY YEAR CONVERTIBLE FIVE-AND-ONE-HALF (5½%) PER CENT. BONDS OF THE DEBTOR DUE IN 1949,

*Petitioners,*

*against*

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.

# No. 1073

PROTECTIVE COMMITTEE FOR THE HOLDERS OF COMMON STOCK OF MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR,

*Petitioner,*

*against*

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.

# No. 1074

ALLEGHANY CORPORATION,

*Petitioner,*

*against*

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR, ET AL.

---

## PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

---

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Missouri Pacific Railroad Company, Debtor, the Protective Committee for Holders of First Mortgage Bonds of

International-Great Northern Railroad Company, Gerald Axelrod, et al. owners and holders of Twenty-Year Convertible 5½% Bonds of the Debtor, the Protective Committee for the Holders of Common Stock of Missouri Pacific Railroad Company, and Alleghany Corporation, the owner of more than $11,000,000 of the Convertible 5½% Bonds and of substantial amounts of the Preferred and Common Stocks of the Debtor, respectfully petition for writs of certiorari to review a final decision of the Circuit Court of Appeals for the Eighth Circuit, rendered in the above entitled causes on March 5, 1943, and reported in 134 F. (2d) 139.

This decision dismissed appeals from an order entered by the United States District Court for the Eastern District of Missouri, Eastern Division, on November 16, 1942 (unreported, R. 10) denying a petition for an order directing the Trustee of Missouri Pacific Railroad Company, the Debtor in reorganization proceedings under Section 77 of the Bankruptcy Act (11 U. S. C. A. Sec. 205), to repay the loan from the Reconstruction Finance Corporation on a compromise basis discussed with that Corporation which, in the event the compromise rate of interest should be as much as 4%, would result in a saving of some $4,600,000 past accrued interest and the elimination of future interest accruals of $1,388,000 annually (R. 8, 9).

## Questions Presented.

1. Are creditors and stockholders without an interest entitling them to appeal from an order of a District Court denying a petition to effect an economical administration of the trust estate?

2. Are creditors and stockholders without an interest entitling them to appeal where the denial of such a petition vitally affects their participation in the reorganization?

3. Are creditors and stockholders unable to appeal from orders of the District Court in a proceeding under Section 77 of the Bankruptcy Act (except an order disallowing their own claims or an order approving or confirming a plan of reorganization), so that such orders of the District Court are final and conclusive as to them?

4. Even assuming *arguendo* that creditors and stockholders are ordinarily without a standing to appeal from such orders, is this still true where the Trustee takes a position adverse to them—with the result that thereby a review of such orders is effectively prevented?

**Summary Statement of Matter Involved.**

On March 31, 1933, Missouri Pacific Railroad Company (herein sometimes called the "Debtor") filed a petition for reorganization under Section 77 of the Bankruptcy Act (11 U. S. C. A. Sec. 205). Similar petitions were filed by its subsidiary, the New Orleans, Texas & Mexico Railway Company, by the International-Great Northern Railroad Company, a subsidiary of the New Orleans, and by other subsidiaries of such companies (R. 6).

On January 19, 1940, the Interstate Commerce Commission filed its original report and order proposing a plan of reorganization. Thereafter, on April 9, 1940, the Commission issued its supplemental report and order, including and approving a plan of reorganization, which was (with certain modifications not material here) approved by the District Court on July 12, 1941 (R. 7, 13-54).

There is now outstanding and unpaid a loan made by the Reconstruction Finance Corporation (herein sometimes called the "RFC") to the Debtor in the principal sum of $23,134,800, plus unpaid interest accrued at the rate of 6% per annum, amounting as of September 1, 1942 to $10,462,410 (R. 8). The total claim of the RFC as of Septem-

ber 1, 1942, was, therefore, $33,597,210. The loan is evidenced by secured notes executed by the Debtor in favor of the RFC prior to the institution of the reorganization proceedings in 1933 and the last of which matured in 1935. As security for its loan, the RFC holds certain collateral, consisting for the most part of stocks and bonds of the Debtor and subsidiaries, having a par value of approximately $64,500,000, a principal item of which is $32,250,000 face value of the Missouri Pacific First & Refunding 5% Bonds, due 1965-81 (239 I. C. C. 17-18).

The RFC has indicated its willingness, if its loan is repaid in cash, to adjust the rate of interest thereon from the rate of 6% specified in the notes to a rate of not exceeding 4%, such adjustment to be made from the dates of the notes, which were executed more than ten years ago. Such an adjustment at 4% would reduce the amount due to the RFC for interest as of September 1, 1942, from $10,462,410 to $5,852,772, and would result in a saving to the Debtor's estate of $4,609,638 (R. 9). In addition, repayment of the loan would eliminate the future accrual of any interest thereon, which at the rate of 6% now amounts to $1,388,088 a year.

On December 31, 1936, the date used by the Interstate Commerce Commission in its report on a plan of reorganization in discussing the Debtor's assets, the Debtor had cash on hand of only about $13,000,000 (239 I. C. C. 37). As of September 1, 1942, the Debtor had available cash and the equivalent of cash sufficient to repay the RFC loan and accrued interest on the compromise basis, and to have left adequate cash for all reasonable and necessary expenses (R. 8). As of December 24, 1942, the Debtor and its subsidiaries had on hand cash and the equivalent of cash amounting to more than $70,000,000 (R. 64). Operations under current conditions "have resulted in very large cash accumulations in the hands of the Trustee" (R. 87).

On October 2, 1942, the Debtor, the Protective Committee for the General Mortgage Bonds, the Protective Committee for First Mortgage Bondholders of International-Great Northern Railroad Company, and Gerald Axelrod and others as holders of Convertible 5½% Bonds petitioned the District Court for an order directing the Trustee to make a compromise with the RFC with the interest adjusted thereon as aforesaid. Other creditors and stockholders who are petitioners herein were allowed to intervene and become parties to that proceeding. A hearing was held on October 30, 1942, and on November 16, 1942 the District Court entered an order denying the petition, the only reason stated being that it appeared to the Court that the granting of the petition would not then be "in the interest of the trust estate and of the creditors" (R. 11).

Appeals were taken from this order by three separate groups representing various creditors and stockholders. The Trustee, two bondholders' committees and Savings Bank Trust Company moved to dismiss the appeals upon the grounds, *inter alia*, that the appellants had no interest entitling them to appeal from the order of the District Court (R. 55, 67, 75). On March 5, 1943, the Circuit Court of Appeals for the Eighth Circuit handed down a decision (R. 84-9) dismissing the appeal on the ground that the appellants had no "appealable interest".

This petition seeks a review of the decision of the Circuit Court of Appeals for the Eighth Circuit.

**Reasons Why Writs of Certiorari Should Issue.**

1. *The Circuit Court of Appeals for the Eighth Circuit has made a ruling in the case at bar which is in conflict with previous decisions of Circuit Courts of Appeals in other Circuits, to wit:*

*In re Keystone Realty Holding Co.*, 117 F. (2d) 1003 (C. C. A. 3rd, 1941);

*Dana* v. *Securities & Exchange Commission,* 125 F. (2d) 542 (C. C. A. 2nd, 1942).

*Pullman Couch Co.* v. *Eshelman,* 1 F. (2d) 885 (C. C. A. 4th, 1924);

See also *In Re Fonda, J. & G. R. Co.,* 95 F. (2d) 397, (C. C. A. 2nd, 1938).

In *In re Keystone Realty Holding Co.,* a reorganization proceeding under Chapter X of the Bankruptcy Act, the Circuit Court of Appeals for the Third Circuit denied motions to dismiss the appeal of creditors made on the ground that they had "no right to take an appeal" (117 F. (2d) 1004). In so deciding, the Court began by stating the general proposition that creditors must have an appealable interest who seek to appeal from the allowance of another creditor's claim in ordinary bankruptcy proceedings; and that the same rule is applicable in reorganizations under former Section 77B.[1] The Court held, however, that Section 206 [2] of Chapter X of the Bankruptcy Act has changed this rule in reorganization proceedings under that Chapter, since that Section conferred upon creditors "the right to be heard on all matters arising in a proceeding under this chapter". The Court held that this statutory provision, expressly conferring the right to be heard, carried with it the right to appeal, saying at p. 1005:

> "We think that the right to be heard which Congress by Section 206 conferred upon creditors included the right of creditors adversely affected to appeal."

The language of subsection (c) (13) of Section 77 [3] conferring on creditors and stockholders in a railroad reor-

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[1] Citing *Jonas* v. *Bellerive Investment Co., infra,* decided by the Circuit Court of Appeals for the Eighth Circuit.

[2] 11 U. S. C. A. Sec. 606.

[3] 11 U. S. C. A. Sec. 205 (c) (13).

ganization proceeding thereunder "the right to be heard on all questions arising in the proceedings" is almost identical with that in Section 206 of Chapter X, on the basis of which the Circuit Court of Appeals for the Third Circuit held that creditors had a "right to take an appeal".

In *Dana* v. *Securities & Exchange Commission, supra,* the Circuit Court of Appeals for the Second Circuit followed the holding in the *Keystone Realty* case. There, in deciding that a shareholders committee which was denied the right to intervene had every substantial privilege which formal intervention would have given, the Court held that the above language of Section 206, Chapter X (which, as shown, is almost verbatim with subsection (c) (13) of Section 77) "extends the right to appeal" to all matters arising in such a proceeding.

In *Pullman Couch Co.* v. *Eshelman, supra,* the Circuit Court of Appeals for the Fourth Circuit held that an appeal was properly taken by one creditor from a compromise of the claims of certain other creditors. In affirming the appeal, the Court said at p. 888:

> "It follows that, the case being here properly on appeal, the petition to superintend and revise is dismissed, and the decree of the District Court appealed from is affirmed."

*In re Fonda, J. & G. R. Co., supra,* the Circuit Court of Appeals for the Second Circuit held that a bondholders committee had the right to appeal from an order of the District Court denying the committee's petition that the trustee abandon the Railway's electric lines and substitute in their place motorbus service. The Court denied the motion to dismiss the committee's appeal. The bondholders committee had taken two appeals, one as of right under former Section 24(a) of the Bankruptcy Act; the other, by leave of the Court under former Section 24(b)

(11 U. S. C. A. Secs. 47 (a) and 47 (b) ). The Court denied a motion to dismiss the appeal as of right. As this Court held in *Albin* v. *Cowing Pressure Co.*, 317 U. S. 211 (December 7, 1942), "The amendments to Sec. 24(a) made by the Chandler Act practically abolished the distinction between appeals as of right and by leave."

However, the decisions of the Courts under former Section 24(b), under which appeals were allowed only "in the discretion of the appellate court" remain as authority on the question whether creditors have an appealable interest. The leave of the appellate court being required under former Section 24(b), the granting of leave carried with it a decision that the creditor had a standing to appeal. Thus, in *In re Prudence Co., Inc.*, 98 F. (2d) 559 (1938), the Circuit Court of Appeals for the Second Circuit granted leave to appeal to a creditor who opposed a compromise of Federal income tax claims on the basis of a smaller cash payment. Moreover, in that case the trustee of the debtor company in reorganization had not taken a position adverse to the appellant creditor, but had merely petitioned the District Court for instructions as to whether the compromise should be made.

Accordingly, a conflict exists between the decision of the Circuit Court of Appeals for the Eighth Circuit in the case at bar and decisions by the Circuit Courts of Appeals for the Second, Third and Fourth Circuits.

2. *The Circuit Court of Appeals for the Eighth Circuit has decided two important questions of Federal law which have not been, but should be, settled by this Court.*

The decision of the Circuit Court of Appeals here involves questions of great significance,[4] namely: (1) Are creditors

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[4] These questions are of immediate importance in reorganization proceedings. The recent decisions of this Court in *Ecker* v. *Western Pacific Railroad Corporation*, U. S. , 87 L. Ed. 650 and *Group of*

and stockholders without a right to appeal from an order of the District Court other than an order disallowing their own claims or one approving or confirming a plan? and (2) May the Trustee by taking a position adverse to the petition of creditors and stockholders effectively block all review of such an order of the District Court? While it is submitted that the decision here should not have the effect of an affirmative answer to these questions, it will doubtless be so taken by some. The clarification of the possible implications in the instant decision and the resolution of the conflicts and uncertainties in which it is grounded, are of great importance in bankruptcy and reorganization proceedings.

There is the utmost confusion as to the right of a creditor or stockholder in bankruptcy and reorganization proceedings to appeal from orders other than those allowing the claim of another creditor. In the following cases appeals were taken with the right of the creditors to appeal not being mentioned—hence with such right being assumed to exist: *In re Prima Co.*, 88 F. (2d) 785 (C. C. A. 7th, 1937)—appeal from authorization of the issuance of trust certificates; *Van Schaick* v. *McCarthy*, 116 F. (2d) 987 (C. C. A. 10th, 1941)—appeal from authorization of improvement program by trustee; *In re Irving-Austin Building Corp.*, 100 F. (2d) 574 (C. C. A. 7th, 1938)—appeal from granting of allowance to others, as well as to trustee. In *Scott* v.

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*Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, U. S. , 87 L.Ed. 687, both decided March 15, 1943, did not pass upon the propriety of the use of war-time earnings or other accumulations of cash for the retirement of existing obligations of the debtor; but this question is of great importance to every railroad now in the process of reorganization because of the large accumulations of cash in the hands of trustees, which the Circuit Court of Appeals commented on in the instant case (R. 86, 87). The decision of the Circuit Court of Appeals in the case at bar denies to creditors and stockholders the right to appeal and makes final the decision of the District Court upon this important and timely federal question.

*Jones,* 115 F. (2d) 133 (C. C. A. 10th, 1940), the Court held that the appeal was proper which creditors took from an order directing the trustee to accept a bid for the purchase of a certain interest of the bankrupt estate.

On the other hand, there are other decisions denying creditors the right to appeal, to wit: *In re Western Pacific R. Co.,* 122 F. (2d) 807 ( C. C. A. 9th, 1941) and *Amick* v. *Mortgage Security Corp.,* 30 F. (2d) 359 (C .C. A. 8th, 1929).

In the *Amick* case the question was clearly presented as to whether a single creditor had the right to petition for a review of an order directing the trustee in bankruptcy to pay certain sums to a mortgagee of the bankrupt. While the Court reached the conclusion that such right did not exist there, it did so only after a lengthy discussion of the many conflicting cases involving the right of a creditor to appeal orders in bankruptcy. At 30 F. (2d) 361 the Court said:

> "There are two lines of authority upon the proposition presented, and, while efforts have been made in later opinions to reconcile them, it seems that the rationale of the two leading cases are not reconcilable. The two leading cases are Chatfield *v.* O'Dwyer, decided by the Circuit Court of Appeals of this circuit on May 21, 1900, and reported in 101 F. 797, and In re Roche, decided by the Circuit Court of Appeals of the Fifth Circuit the same month, and reported in 101 F. 956."

Even the decisions of the Circuit Court of Appeals for the Eighth Circuit are in confusion. Its decision in the instant case denies the right to appeal, while in *Bankers Trust Co.* v. *Henwood,* 88 F. (2d) 163 (C. C. A. 8th, 1937) it granted leave to creditors to appeal from an order of the District Court authorizing the trustee of the St. Louis Southwestern Railway Company, debtor, to purchase equip-

ment with cash in the debtor's treasury rather than through the issuance of trust certificates. The appellant creditors there sought to have the cash in the debtor's treasury applied instead to the payment of interest on certain obligations.

In the instant case the Trusteee filed an answer in the District Court opposing the petition and took a position adverse to the creditors and stockholders who are petitioners herein (R. 59). Although this important fact was urged in the Circuit Court of Appeals, that Court disregarded it and denied these creditors and stockholders an appeal. In so doing the Court made a decision contrary to the principle recognized by the Circuit Court of Appeals for the Second Circuit in *Christian* v. *Hoe & Co., Inc.*, 79 F. (2d) 541 (C. C. A. 2nd, 1935), that where the position of the trustee is inconsistent with his taking an appeal, creditors and stockholders have an appeal as of right. There the Court, in a Section 77B reorganization proceeding and in a prior equity sequestration suit, held that generally allowances cannot be appealed by a creditor as a matter of right. However, it recognized exceptions, saying (pp. 541-2):

> "But that rule does not apply to the allowance of the trustee itself, or to that of its attorneys; obviously the trustee would not appeal from these * * * We assume without deciding that in so far as the trustee and its attorneys were awarded anything for services rendered in the proceeding as distinct from the suit, no leave to appeal was necessary."

The case at bar presents both clear conflicts between decisions of different Circuit Courts of Appeals and also important questions of Federal law of general and immediate importance which have not been, but should be, settled by this Court.

## Prayer.

For the foregoing reasons, which are developed in some detail in the accompanying brief, your petitioners pray that writs of certiorari issue out of this Court to the United States Circuit Court of Appeals for the Eighth Circuit to the end that the above-entitled causes may be reviewed and determined by this Court; that the final orders of said Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as is proper.

New York, N. Y., June 3, 1943.

Respectfully submitted,

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## BRIEF IN SUPPORT OF PETITION.

### Opinions Below.

The United States District Court for the Eastern District of Missouri, Eastern Division, entered an order denying the petition for a compromise of the RFC claim on November 16, 1942 (R. 10). The opinion of the Circuit Court of Appeals for the Eighth Circuit dismissing the appeals (R. 84-89) is reported in 134 F. (2d) 139.

### Jurisdiction.

The orders of the Circuit Court of Appeals for the Eighth Circuit were entered on March 5, 1943 (R. 89-92). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code (28 U. S. C. A. Sec. 347 (a) as amended by the Act of February 3, 1925, 43 Stat. 938).

### Statement of the Case.

A summary statement of the facts is given in the petition, pages 3-5 above.

### Statutes Involved.

The jurisdiction of appellate courts is regulated by the Act of June 22, 1938, c. 575, Sec. 1, 52 Stat. 854 (11 U. S. C. A. Sec. 47) which provides:

> "Jurisdiction of appellate courts.
>
> a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankrupcty in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in

proceedings in bankruptcy, to review, affirm, revise or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

**Specifications of Errors to be Urged.**

1. The Circuit Court erred in dismissing the appeals from the order of the District Court.

2. The Circuit Court erred in holding that the petitioners herein did not have an interest entitling them to appeal from the order of the District Court.

3. The Circuit Court erred in not holding that the fact that the Trustee had taken an adverse position entitled the petitioners herein to appeal from the order of the District Court.

**Summary of Argument.**

I.

The petitioners herein are directly and adversely affected by the District Court's denial of the petition.

II.

An order of a District Court refusing to direct the Trustee to administer the estate economically may be appealed from by creditors and stockholders, particularly where the question of economical administration vitally affects their participation in the reorganization.

III.

Where the trustee has taken a position adverse to that of creditors and stockholders, they are entitled to take an appeal.

## ARGUMENT.

I.

**The petitioners herein are directly and adversely affected by the District Court's denial of the petition.**

In dismissing the appeals the Circuit Court of Appeals for the Eighth Circuit found that the order of the District Court "does not directly adjudicate upon any claim of any creditor, secured or unsecured" and that "each creditor retains after the order the same claim it had before and the assets are unchanged." Such conclusions ignore the substance of petitioners' contention. It is, as in the *Fonda Railway* case *supra*, the refusal of the District Court to direct the effectuation of a saving in which the petitioners have a vital interest, that is the basis of their right to appeal. The fact that the appeals were taken from an order denying a payment out of the estate can of course make no difference; the question is not one of form, but of substance. As the Circuit Court of Appeals for the Second Circuit said in the *Fonda Railway* case, in answering the contention that the order there did not grant the

abandonment but refused it, and in holding that the motion to dismiss the appeal must be denied:

> "But it is seldom, if ever, that the right of appeal is made to depend upon whether an issue presented for decision is determined affirmatively or negatively. We cannot think Congress intended to cut so fine" (95 F. (2d) 397, 399).

In the *Fonda Railway* case the interest of the appellants was only that of bondholders interested in the economical operation of the trust estate; and there the debtor's trustee, instead of opposing the desire of the bondholders to effect economies, was in entire accord with them. Certainly the effectuation in the instant proceeding of an immediate saving of more than $4,600,000 of past interest and a future annual saving of $1,388,000 seems no less in either kind or degree than the saving to sustain which the Circuit Court of Appeals for the Second Circuit held that bondholders there had a right to appeal.

The petitioners herein are creditors and stockholders. Under the plan of reorganization approved by the Commission and the District Court,[5] stockholders are wiped out and these creditors receive only partial payment of their claims. The Convertible 5½% Bonds of the Debtor, of which some of the petitioners own and represent large amounts, receive under that plan for each $1,000 principal amount thereof and all unpaid interest thereon as of January 1, 1940, only 2.42 shares of no par value common stock.

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[5] On May 8, 1943, the Circuit Court of Appeals for the Eighth Circuit remanded the appeals then pending in that Court on the plan of reorganization to the District Court, which has ordered that a hearing be held before it to determine "whether (that plan of reorganization) shall be confirmed and to determine any and all other matters relevant thereto."

The new securities allocated to the RFC under the present plan of reorganization consist in the main of new fixed interest First Mortgage Bonds and represent over 7% of the total of $423,722,500 in reorganization securities which will be prior to the common stock that is the principal security allocated to all but one of the petitioners in respect of the indebtedness owed them (R. 45 and 239 I. C. C. 7, 155, end of Appendix E). Use by the Trustee of idle cash now on hand to repay the RFC loan would save annual charges prior to the common stock equivalent to dividends of more than $1 per share on the common stock of the reorganized company (ibid). This would justify a large and material increase in the amount of the common stock which could be made available in reorganization.

It is respectfully submitted that it is difficult to see how it can be contended that the petitioners are not directly and adversely affected by the refusal of the District Court to direct such a saving.

The foregoing relates only to the petitioners who are creditors. Some of the petitioners are holders of large amounts of stock of the Debtor and under the present plan are eliminated from any participation in the reorganized company. The only way in which present stockholders have a possibility of participating in the new capitalization proposed by the present plan is by the payment and elimination of prior claims. Accordingly, the payment of the RFC and underlying debt, or conversely, the refusal of the District Court to authorize such payment, may make all the difference between participation in the plan of reorganization and non-participation—all the difference between receiving something and nothing. It is not of course contended that the refusal to authorize such payments con-

stitutes a denial of the claim of the petitioners—as to which all the authorities agree there would be a right to appeal; but the result is the same.

Accordingly, it is respectfully submitted that the denial of the petition by the District Court directly and adversely affects the interest of the petitioning creditors and stockholders whose claims are junior to the RFC loan.

II.

**An order of a District Court refusing to direct the trustee to administer the estate economically may be appealed from by creditors and stockholders, particularly where the question of economical administration vitally affects their participation in the reorganization.**

Appeals by creditors and stockholders have been taken in numerous cases from orders of district courts approving compromises in bankruptcy and reorganization proceedings.

*Pullman Couch Co.* v. *Eshelman*, 1 F. (2d) 885 (C. C. A. 4, 1924);

*Drexel* v. *Loomis*, 35 F. (2d) 800 (C. C. A. 8, 1929);

*Hair* v. *Byers*, 92 F. (2d) 684 (C. C. A. 5, 1937);

*Scott* v. *Jones*, 118 F. (2d) 30 (C. C. A. 10, 1941).

Similarly, appeals were taken by creditors and stockholders from compromises in equity receivership cases.

*West* v. *Radio-Keith-Orpheum Corp.*, 68 F. (2d) 869 (C. C. A. 2, 1934);

*McDonald* v. *Aetna Indemnity Company*, 92 Atl. 154 (Sup. Ct. of Errors of Conn., 1914);

*Gerdes, Corporate Reorganization*, Vol. 2, p. 1223.

Creditors and stockholders in bankruptcy and reorganization proceedings have also been permitted to appeal from various other orders of district courts for the purpose of furthering a sound and economical administration of the estate. See *supra In re Fonda, J. & G. R. Co.; Van Schaick* v. *McCarthy; In re Irving-Austin Building Corp.;* and *Bankers Trust Co.* v. *Henwood.*

Although the District Court refused to authorize the compromise here on the basis of its not being "in the interest of the trust estate and of the creditors" (R. 18), the Circuit Court of Appeals held that the creditor and stockholder petitioners herein have no appealable interest; that "such general interest is (the Debtor's Trustee's) interest and not the interest of the individual creditors or the Debtor or its stockholders." In reaching this conclusion the Court relied upon decisions holding that creditors have no standing to appeal from orders of District Courts allowing the claims of other creditors.[6] It is submitted, however, that this principle is not applicable to appeals from the granting or denying of a compromise of the claim of another creditor, particularly in Chapter X or Section 77 reorganization proceedings. (*In re Keystone Realty Holding Company, supra.*)

While the two other decisions relied upon by the Circuit Court in the instant case support the decision of that court (except for the important distinction discussed in Point III below), *Amick* v. *Mortgage Security Corp.* and *In re West-*

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[6] *Chatfield* v. *O'Dwyer,* 101 F. 797 (C. C. A. 8, 1900); *Jonas* v. *Bellerive Inv. Co.,* 90 F. (2d) 688 (C. C. A. 8, 1937); *Foreman* v. *Burleigh,* 109 F. 313 (C. C. A. 1, 1901); *In re Lewensohn,* 121 F. 538 (C. C. A. 2, 1903); *In re Chakos,* 24 F. (2d) 482 (C. C. A. 7, 1928).

*ern Pacific R. R. Co., supra,* those decisions only increase the confusion and emphasize the conflict between the Circuit Courts as to the right of creditors and stockholders to appeal from orders (except orders allowing claims of other creditors) entered by the District Courts in bankruptcy and reorganization proceedings.

## III.

**Where the trustee has taken a position adverse to that of creditors and stockholders, they are entitled to take an appeal.**

But even assuming *arguendo* that the decisions in the *Amick* and *Western Pacific* cases are correct in the ordinary situation and that the *Keystone, Dana, Eshelman* and *Fonda* decisions are erroneous, the petitioners herein are entitled to appeal.

The Trustee in this proceeding has taken a position on the merits opposed to the petitioners and has been active in opposition, filing an answer requesting the denial of the petition (R. 59). By thus taking a position adverse to our contentions, his sincerity not being questioned, the Trustee has effectively barred himself from exercising an election to appeal in behalf of these petitioners. Certainly after having successfully opposed the petition, the Trustee could not appeal from a decision in his favor. Accordingly, the only avenue of appeal now lies through one or all of the parties whom the Trustee has opposed.

This contention was strenuously argued before the Circuit Court by the petitioners herein, but the Circuit Court did not feel that this fact was of sufficient importance even to justify mention. The Circuit Court completely ignored

the recognition of this principle in *Christian* v. *Hoe & Co., Inc.*, 79 F. (2d) 541 (1935), where the Circuit Court of Appeals for the Second Circuit, while holding that creditors and stockholders generally have no right to appeal from allowance orders, distinguished the situation where the order appealed from was one where the debtor's trustee was in an adverse position, saying:

> "But that rule does not apply to the allowance of the trustee itself, or to that of its attorneys; obviously the trustee would not appeal from these * * * We assume without deciding that in so far as the trustee and its attorneys were awarded anything for services rendered in the proceeding as distinct from the suit, no leave to appeal was necessary" (pp. 541-2).

It is thus clearly recognized that where the position of the trustee is opposed to that of creditors or stockholders, such creditors or stockholders have the right to appeal. The decision of the Circuit Court was erroneous in that it failed to recognize this important principle. Thus, even assuming that the *Amick* and *Western Pacific* cases are correct, they are not controlling in this situation for in neither of those cases had the trustee aken an adverse position.

If the decisions of the Second, Third and Fourth Circuits in the *Fonda, Dana, Keystone* and *Eshelman* cases are correct, *a fortiori* when the Trustee has taken a position which is adverse to that of the creditors, those creditors have the right to appeal from the orders of the District Court.

## Conclusion.

This cause involves federal questions of first importance which should be reviewed and settled by this Court and writs

of certiorari should issue for that purpose,[7] as prayed in the foregoing petition.

Dated June 3, 1943.

Respectfuly submitted,

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[7] The importance of procedural questions of less scope and significance in connection with the right to appeal in reorganization proceedings under the Bankruptcy Act has recently been clearly recognized by this Court in *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382 (1940). There this Court granted certiorari on the question whether an appeal could be taken as of right from a decision which made an allowance of only $10,000—expressly on the basis of a conflict with a ruling of another Circuit Court of Appeals which held that appeals can be taken as of right under the Chandler Act from compensation orders involving $500 or more.